Supreme Court, U. S.
FILED
DEC 12 1973
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1973

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NO. 73-283

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TULES ZAPATA,

Petitioner

VS.

THE STATE OF TEXAS,

Respondent

• • •

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of the State of Texas

• • •

RESPONDENT'S BRIEF IN OPPOSITION

• • •

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

JOE B. DIBRELL
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

SARAH J. SHIRLEY
Assistant Attorney General

Attorneys for Respondent

P. O. Box 12548, Capitol Station
Austin, Texas 78711

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Opinion of the Court of Criminal Appeals of the State of Texas, for which review is sought here, is reported

in *Zapata v. State of Texas*, 493 S.W.2d 201 (1973). A copy of the Opinion is attached to this Respondent's Brief in Opposition.

JURISDICTION

The formal jurisdictional requisites of the petition and its timely filing would appear to be satisfied although Respondent disputes Petitioner's contention that any rights guaranteed by the Constitution of the United States have been violated.

QUESTIONS PRESENTED

Respondent believes that the questions presented for review should be stated as follows:

(1) Did the Court of Criminal Appeals of the State of Texas commit constitutional error in holding that the evidence before the trial court was insufficient to raise the issue of Petitioner's competency to stand trial, and that hence the trial court was not required, sua sponte, to conduct a separate hearing during the trial to determine Petitioner's present sanity.

(2) Did the Court commit constitutional error in failing to impanel a jury to determine Petitioner's competency after the hearing subsequent to the trial.

(3) Did the Court of Criminal Appeals of the State of Texas commit constitutional error in holding that the indictment set forth the offense in plain and intelligible language, sufficient to satisfy constitutional requirements.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner contends that Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as well as Article 46.02, Texas Code of Criminal Procedure, are involved herein.

STATEMENT OF THE CASE

On May 31, 1971, Petitioner shot and killed her husband. She was indicted and tried before a jury for the offense of murder with malice aforethought. Petitioner relied upon the theory of self defense as the basis of her defense. During the trial, testimony was given on behalf of the Petitioner concerning her mental state prior to and subsequent to the commission of the crime. At no time did Petitioner assert that she was presently incompetent to stand trial. No request was made for a sanity hearing, nor was any charge to the jury on the issue of present or past insanity sought.

The jury found the Petitioner guilty of the offense as charged, and she was sentenced to confinement for twenty-five years in the Texas Department of Corrections. Notice of Appeal was given by the Petitioner. Subsequently, Petitioner filed an Application for Writ of Habeas Corpus in the convicting court, in which she contended that confinement in jail pending the outcome of the appeal of her conviction endangered her life. A hearing was conducted, at which testimony was given relating to Petitioner's mental state. The Court ordered the transfer to the state hospital of Petitioner for an evaluation of her mental condition. Subsequently, an order was entered by the court mandating the return of Petitioner to the Guadalupe County Jail. The Order recited the conclusion

of the Unit Director and of the Clinical Director of the State Hospital to the effect that Petitioner was mentally competent to stand trial.

The Court of Criminal Appeals of the State of Texas affirmed the conviction of Petitioner, which affirmance is challenged in the Petitioner's instant Petition for Certiorari.

ARGUMENT AND AUTHORITIES

1. *The Court of Criminal Appeals of the State of Texas did not commit constitutional error in holding that the evidence before the trial court was insufficient to raise the issue of Petitioner's competency to stand trial, such as to require the court, sua sponte, to conduct a separate competency hearing during the trial.*

Petitioner initially contends that the trial court's failure to conduct, sua sponte, a separate hearing during the trial to determine Petitioner's present competency to stand trial deprived Petitioner of due process of law. In support of such contention, Petitioner relies upon the holding of this Court in *Pate v. Robinson*, 383 U.S. 375 (1966) to the effect that failure to afford the defendant a hearing on the issue of present competency violates due process where evidence before the trial court raises a sufficient doubt as to said defendant's sanity at the time of trial. Petitioner asserts that the testimony at the trial of Dr. William Gonzaba, concerning Petitioner's mental condition prior to and subsequent to the commission of the crime, was sufficient to raise such a doubt.

In *Pate*, the defendant, Robinson, was convicted of

murdering his wife. Although the fact of the murder was conceded at the trial, defense counsel claimed that the defendant was insane at the time of the commission of the offense, and was also not competent to stand trial. The defendant had a history from childhood of mental disturbance. He had previously murdered his infant child and had then attempted suicide. He had been confined as a psychopathic patient in a state mental institution. At the trial, four witnesses testified that the defendant was insane. Despite such evidence, the trial court failed, sua sponte, to conduct a separate hearing on the defendant's competency to stand trial. While no demand was made by the defense for such a hearing, the Court held that "on the basis of this record, we cannot say that [the defendant] waived the defense of competence to stand trial".

The present case presents a situation readily distinguishable from that involved in *Pate*. There the sanity of the defendant was the central, and indeed the sole issue in the case. The evidence indicated almost conclusively that the defendant was insane. The quantity and quality of the evidence in the present case was markedly different. Petitioner claimed self-defense as her sole defense. The testimony of Dr. Gonzaba went only to Petitioner's state of mind prior to and subsequent to the commission of the crime, as supportive of her contention that she was afraid her husband, the deceased, was going to kill her. Unlike *Pate*, no significant evidence of *present incompetency to stand trial* became manifest during the trial of Petitioner.

The test for competency to stand trial has been stated to be "whether the defendant has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and whether he has a rational as well as factual understanding of the proceedings against him," *Sims v. Lane*, 411 F.2d 661, 666 (7th Cir. 1969).

Such test is different from that employed to determine criminal responsibility at the time of the commission of the offense. *Pate* does not mandate a hearing on present competency where the evidence before the court does not warrant one, *U.S. ex rel Roth v. Zelker*, 455 F.2d 1105 (2nd.Cir. 1972), nor in every case in which the issue is raised, *Wilson v. Bailey*, 375 F.2d 663 (4th Cir. 1967); *Tyler v. Beto*, 391 F.2d 993 (5th Cir. 1968). The evidence must be such that a bona fide doubt is raised in the mind of the trial court as to the competency of the defendant to stand trial, as defined by the test stated above, for judicial due process to compel a sua sponte hearing, *Green v. U.S.*, 389 F.2d 949 (U.S.App. D.C. 1969). Moreover, the convening of a competency hearing is within the discretion of the trial judge, based on the facts which are before him in a particular case. *Heard v. U.S.*, 390 F.2d 866 (U.S.App. D.C. 1968). The question is such cases, therefore, is one of whether, the trial court abused its discretion. As the Court of Appeals for the Fifth Circuit stated in *Rice v. U.S.*, 420 F.2d 863, 865 (1969):

> "In order [for the defendant] to prevail on [the incompetency] point, the record must reflect that the court was presented with sufficient facts to believe that the defendant's mental condition was so suspect as to require the court to order a[n] ... exam. Requesting such ... is within the discretion of the court, and the defendant must show that the evidence of incompetency was so strong that the court abused its discretion in refusing to inquire further into the defendant's competency."

As is recognized by Petitioner, the Court of Criminal Appeals of Texas has conscientiously applied the doctrine of *Pate*, *Townsend v. State*, 427 S.W.2d 55 (Tex.Crim. App. 1968); *Morales v. State*, 427 S.W.2d 51 (Tex.Crim.

App. 1968). The Court of Criminal Appeals, however, has required, in accordance with *Pate*, that the evidence raise a bona fide doubt as to the defendant's condition to comprehend his situation or to make his defense before a duty devolves upon the trial court to cause a sanity hearing to be held on that issue. As the Court stated in *Townsend*, supra, at page 63,

> "it is the trial court in whose mind a real doubt of sanity on mental capacity must be raised before that court is required to order an inquiry solely on its own intiative ... [the court's] ... decision will not be disturbed in the absence of an abuse of sound judicial discretion."

Nothing in the opinion of the Court of Criminal Appeals in the instant case is contrary to the doctrine of *Pate*, or to previous state holdings. The court merely held that by announcing ready and entering a plea without a request for a competency hearing in accordance with Article 46.02, V.A.C.C.P., Petitioner waived her right to a separate hearing *before* the trial. It did not hold that by failing to request a hearing, Petitioner waived all right thereto. Had significant facts come to the attention of the court during the trial indicating that Petitioner was incompetent to stand trial, the Court would have been required to hold, sua sponte, a competency hearing. The only evidence before the court which even touched upon the issue, however, was the testimony of Dr. Gonzaba, which went solely to the state of mind of the Petitioner as it pertained to the claim of self defense. At no time was any evidence presented to the court of Petitioner's alleged incompetency to stand trial, as such is defined, nor did anything occur at the trial to indicate to the trial court the possibility of any lack of competence of Petitioner to

stand trial. Respondent submits that no error of constitutional dimension which would warrant granting of certiorari was committed by the trial court in failing to conduct a sua sponte competency hearing.

2. *The trial court did not commit constitutional error in not empaneling a jury to determine Petitioner's competency after the hearing subsequent to the trial.*

Petitioner next asserts as grounds for granting certiorari that error was committed by the trial court in failing to empanel a jury to determine Petitioner's competency after the hearing subsequent to the trial. A hearing was held by the trial court upon Petitioner's Application for Writ of Habeas Corpus, wherein Petitioner alleged that confinement in jail pending the appeal of her conviction endangered her health. Dr. Benhard Langrebe testified on behalf of Petitioner. The Court ordered Petitioner transferred to the San Antonio State Hospital for mental evaluation. On the basis of the evaluation report, in which the Unit Director and the Clinical Director of the hospital concluded Petitioner competent to stand trial, Petitioner was subsequently returned to jail. Her conviction was then affirmed by the Texas Court of Criminal Appeals. As *Pate* does not require a jury determination of competency to stand trial, the trial court's failure to empanel a jury violated no due process right of Petitioner, and hence raises no federal question.

3. *The indictment charging Petitioner with murder with malice aforethought set forth the offense in plain and intelligible language, sufficient to satisfy constitutional requirements.*

Petitioner additionally contends that the indictment, charging her with murder with malice aforethought, was not sufficiently clear to inform her of the offense charged, nor positive enough to support a plea of former jeopardy. The basis of such contention is the omission of the word "did" in the indictment, which reads as follows:

> ". . . that Mrs. Tules Zapata, on or about the 3rd day of May, A.D., 1971, and before the presentment of this indictment, in said County (Guadalupe) and State (Texas), then and there unlawfully, with malice aforethought, kill Luis Zapata by shooting him with a gun, against the peace and dignity of the State."

In 1913, this Court held in *Bartell v. U.S.*, 227 U.S. 427, 431 that:

> ". . . in passing on the legal sufficiency of an indictment, it is necessary only to determine whether or not it satisfies the requirements of the Sixth Amendment that the accused in a criminal prosecution shall be informed of the nature and cause of the accusation against him, and is adequate to enable him to plead the judgment entered as res judicata of any further prosecution for the same offense."

The principle announced therein continues to provide the test for determining the legal sufficiency of the indictment, *U.S. ex rel Harris v. Illinois*, 457 F.2d 191 (7th Cir. 1972); *U.S. v. Bearden*, 423 F.2d 805 (5th Cir. 1970).

Indictments are to be read for their clear and practical meaning, and convictions are not to be reversed because of minor deficiencies which do not prejudice the defendant, *U.S. v. Kahn*, 381 F.2d 824 (7th Cir. 1967); *U.S. v. Missler*, 414 F.2d 1293 (4th Cir. 1969). Whether the

elements of an indictment are sufficiently alleged does not depend on "nice attention to technicality or formalistic recitals", *U.S. v. Kahn*, supra. It is enough that the necessary facts appear in any form, or by their fair construction can be inferred from the specific allegations made, *U.S. v. Kahn*, supra; *U.S. v. Silverman*, 430 F.2d 106 (2nd. Cir. 1970, cert.den. 402 U.S. 953, 1971); *U.S. v. Pleasant*, 469 F.2d 1121 (8th Cir. 1972).

The Court of Criminal Appeals of Texas, in passing on the sufficiency of the indictment involved herein, held that the omission of the word "did" failed to render the indictment fatally defective. In so holding, the court overruled previous cases stating a contrary rule. The Constitution of the United States does not preclude such action, so long as the indictment continues to satisfy the requirements set forth above. The Court read the definition of malice aforethought, which was stated to be "the voluntary and intentional doing of any unlawful act by one of sound memory and discretion with the purpose, means an ability to accomplish the reasonable and probable consequences of the act", in conjunction with the indictment. The Court then held that, when considered with the definition, the indictment set forth "in plain and intellegible words" the offense charged. Respondent submits that the indictment as a whole conveys sufficient information to satisfy the requirements of the Sixth Amendment to the United States Constitution, and that the Texas Court of Criminal Appeals did not commit constitutional error in so holding.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that Petitioner has failed to present any sub-

stantial constitutional issues which would warrant the relief requested. The petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

JOE B. DIBRELL
Assistant Attorney General

SARAH J. SHIRLEY
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

Attorneys for Respondent

P. O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, attorney for the Respondent, do hereby certify that a copy of the above and foregoing Respondent's Brief in Opposition has been deposited in the United States Mail, certified and postage prepaid, on this the _____ day of December, 1973, addressed as follows: Honorable Harry A. Nass, Jr., 1414 Tower Life Bldg., San Antonio, Texas 78205; and Honorable Ruben Montemayor, 1414 Tower Life Bldg., San Antonio, Texas 78205, Attorneys for Petitioner.

LONNY F. ZWIENER
Assistant Attorney General

APPENDIX

TULES ZAPATA, Appellant

NO. 45,782, v. ——— Appeal from Guadalupe County

THE STATE OF TEXAS, Appellee

OPINION

This is an appeal from a conviction for murder with malice. Punishment was assessed by the jury at forty-five years.

The sufficiency of the evidence is not challenged. A summary of the facts is set out for a better understanding of the grounds of error presented.

On the evening of May 3, 1971, Kathryn Soefje, a dispatcher for the Seguin police department, received a call at approximately 10:00 p.m. from one of appellant's children saying that there was a domestic quarrel at the family residence. Officers Layne Dietz and Mike Rosas were dispatched to investigate the call. Both officers testified that appellant threatened to kill her husband in their presence. After calming the two, the officers left.

At approximately 11:30 p.m. the same evening, Officers Roy Paez and Kenneth Strong were summoned to the Zapata residence to investigate an alleged shooting. Upon their arrival at the home they were met by the appellant. She told the officers that she had shot her husband, and then she handed them a pistol.

Initially, the appellant contends that the trial court erred in failing to conduct a separate hearing on her present competency to stand trial. She argues that the uncontroverted testimony of Dr. Gonzaba raised sufficient question as to her incompetency for a period of three years prior to this offense.

No motion for a preliminary hearing on the issue of competency to stand trial under the provisions of Article 46.02, V.A.C.C.P., was filed. In fact, appellant's counsel announced ready and the appellant personally entered her own plea. Counsel then announced that the appellant did not deny shooting her husband and stated that she did it in self-defense. During the trial and after the State had rested, appellant called Dr. William Gonzaba as a witness. He testified that appellant had suffered from hallucinations and various other symptoms of depression prior to and immediately after the shooting occurred. Nowhere does it appear that he considered appellant incompetent to stand trial nor that she was unable to distinguish right from wrong. In fact, at the trial appellant, testifying in her own behalf, gave no indication that she was mentally incompetent. She answered all questions fully and completely with the assistance of an interpreter. Nor is there anything in the record to indicate that appellant's counsel ever requested that she be examined by a psychiatrist. Further, there is no request by appellant's counsel for a competency hearing during the trial.

Appellant, by announcing that she was ready and entering her plea without any suggestion of insanity to the court, waived her right to a separate hearing before the trial. A trial judge is not required to conduct such a hearing on his own motion absent any significant facts being brought to his attention or absent circumstances and

actions which should have indicated a need for a separate determination. Boss v. State, 489 S.W.2d 580. We hold that the testimony of Dr. Gonzaba did not give rise to an issue of appellant's competency to stand trial, especially when analyzed in comparison with appellant's own actions and testimony during the trial.

Next, appellant alleges that the trial court erred in refusing to grant her motion to quash the indictment. She argues that the failure to use the word "did" in the charging portion of the indictment is fatal. It is her contention that such omission is in violation of Articles 21.02(7), 21.03 and 21.04, V.A.C.C.P.

The indictment appears in the record as follows:

> "The Grand Jurors for the County of Guadalupe, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the May Term, A.D. 1971, of the 25th Judicial District Court of said County, upon their oaths present in and to said Court, that Mrs. Tules Zapata, on or about the 3rd day of May, A.D. 1971, and before the presentment of this indictment, in said County and State, then and there unlawfully, with malice aforethought, kill Luis Zapata by shooting him with a gun, against the peace and dignity of the State."

Appellant, relying on Mesa v. State, 462 S.W.2d 600, argues that the word "did" is an essential word in the indictment. It is her position that the word "did" must appear just prior to "... then and there unlawfully," or before "... kill Luis Zapata," in order that the indictment contain everything that is necessary to be proved with the required degree of certainty.

The real issue is whether the indictment sets out the offense charged in plain and intelligible language. We are mindful of our holding in Moore v. State, 473 S.W.2d 523 (1971), where Presiding Judge Onion, speaking for the majority, said:

> "It is, of course, not sufficient to say that the accused knew with what offense he was charged; but the inquiry must be whether the charge in writing furnished that information in plain and intelligible language."

Before analyzing the language of the indictment in the present case, it is necessary that we look at the definition of "malice aforethought." The legal definition of such, as defined by the Court, is "the voluntary and intentional doing of an unlawful act by one of sound memory and discretion with the purpose, means, and ability to accomplish the reasonable and probable consequences of the act." Witty v. State, 171 S.W. 229 (1915). Now a careful reading of the charging portion of the indictment shows "that Mrs. Tules Zapata, on or about the 3rd day of May, A.D. 1971, and before the presentment of this indictment, in said County and State, *then and there unlawfully, with malice aforethought, kill Luis Zapata by shooting him with a gun.*" (Emphasis Supplied)

Considering the definition of malice aforethought in connection with the indictment, we hold that the indictment sets forth the offense in plain and intelligible words as required under the provisions of Article 21.02(7), V.A.C.C.P. The insertion of "did" in one of the two places or both would make the charging portion read smoother and more grammatically correct. To the extent that other

cases are in conflict with this holding, they are overruled. See Edmondson v. State, 41 Tex. 496.

Also, the appellant claims that the indictment should have been quashed because Mexican Americans were systematically excluded from grand juries in Guadalupe County. She relies on the grand jury list for the years 1967 through 1971. Those lists show that twelve percent of the grand jurors, during those years, had Mexican American names. Counsel for appellant argues that since Guadalupe County has approximately a fifty percent Spanish surname population, such percentage should reflect in the make-up of the grand juries. What appellant has failed to show is how many females with Spanish surnames may have married other than Spanish surname males and served on such juries. Nor does her evidence reflect how many Spanish surname persons were summoned for such duty and requested to be excused because of job requirements or health reasons. Also, we note from the record that three Mexican Americans served on the grand jury which indicted appellant. We perceive no harm to appellant. See Ex parte Woods, 483 S.W.2d 464, and Jaquez v. State, 473 S.W.2d 530.

The appellant next contends that the prosecutor suppressed evidence. She argues that the trial court erred in refusing to grant her motion for discovery of a tape recording taken at the grand jury proceedings. She argues that the contents of that recording would show that the prosecutor had information concerning a knife allegedly found on the deceased's body, such information being vital to the issue of self-defense.

The record shows that in the hearing on his motion, appellant called Officers Paez and Strong as witnesses.

Both officers denied the existence of such a knife. Also, the district attorney denied that he had any knowledge of a knife being found on the deceased. The trial judge called for the inventory of deceased's clothing and personal items taken from his body. It did not reflect the existence of a knife. After the trial judge denied the motion for discovery, he instructed the district attorney to bring him the tape recording and he would listen to it. If the recording produced any information about a knife, he said that he would change his previous denial. Nothing further is shown. Appellant has not shown any harm.

Lastly, appellant contends that even if she is not entitled to hear the tape recording of the testimony before the grand jury, the tape recording itself violated the provisions of Article 20.02, V.A.C.C.P. Even if such were a violation, it would not require a reversal of this cause.

No reversible error being shown, the judgment is affirmed.

Douglas, Judge

(Delivered April 25, 1973)

TULES ZAPATA, Appellant

NO. 45,782 v. Appeal from GUADALUPE County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

The majority holds that the word "did" is no longer an essential word in an indictment alleging murder with malice aforethought when charging the acts which constituted the crime involved. The majority appears to conclude the word may be supplied by argument or intendment, and is necessary only if the pleader wants to be "more grammatically correct." In so holding, the majority expressly overrules Edmondson v. State, 41 Tex. 496 (1874), and other cases in conflict, thereby abrogating a general rule of pleading in criminal cases that has existed in this jurisdiction for over one hundred years.

In support of his contention that the indictment was fatally defective, the appellant relies upon Article 21.02(7), Vernon's Ann.C.C.P. (requisites), which requires that the "offense must be set forth in plain and intelligible language," and upon Articles 21.03 and 21.04, Vernon's Ann.C.C.P. These articles respectively read, as follows:

> "Everything should be stated in an indictment which is necessary to be proved."

And

> "The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense."

It has long been established that it must be alleged in plain and intelligible words that the accused did things which constituted the offense. See Article 21.02, supra, note 37, and authorities there cited. And, "[f]acts must be alleged by direct, certain, and positive averments, and not by way of argument and inference." 1 Branch's Ann.P.C., 2d ed., §513, p. 495-496.

In Hutchison v. State, 26 Tex. 111 (1861) (concerning a prosecution for unlawfully killing an animal coming within the meaning of an estray), the court said:

> ". . . The omission of so important a word (did), a word indispensable to make sense, in charging the offense, ought not to be supplied by intendment."

State v. Daugherty, 30 Tex. 360 (1867) (unlawful interference with private property or private rights), held that where an indictment omits a material word, although it be but a preposition or a helping verb, the court will not, from a knowledge of the language, supply the missing word so as to supply the probable intention of the grand jury. The court, thus, sustained a judgment quashing an indictment on the basis of the omission of the word "did", the State then having the right to appeal.

And, in Edmondson v. State, 41 Tex. 496 (1874) (a murder prosecution), where the offense was alleged to have been done with "express malice aforethought," the court said:

> ". . . [T]he averment, as to injuries inflicted with a stick, not only lacks the proper specification of time and place, but omits the word 'did' in a connection where it was material—an omission which has been

repeatedly held good ground for quashing an indictment."

In 1876, the Court of Appeals in Ewing v. State, 1 Tex. App. 362 (1876) (a prosecution for abortion), cited with approval the foregoing cases, and said:

> "The indictment in this case is fatally defective because it fails to allege that the defendant 'did' the acts charged as constituting the crime. This word is indispensable, and cannot be supplied by intendment."

To the same effect are the holdings in Tompkins v. State, 4 Tex. App. 161 (1878) (keeping a disorderly house for the purpose of public prostitution), and Moore v. State, 7 Tex. App. 42 (1879). And Walker v. State, 9 Tex. App. 177 (1880), noted that the omission of the word "did" in the pleadings had been "uniformly adjudged substantial."

In Jester v. State, 9 S.W. 616 (Tex.Cr.App. 1888) (involving a burglary prosecution), the Court of Appeals said:

> ". . . In the indictment, as it appears in the record, there is a fatal defect, in so far as it undertakes to charge burglary. It alleges that the defendant 'then and there, by force, break and enter a house,' etc.; omitting the essential word 'did'. If such omission be in the original indictment, a conviction for said offense cannot be sustained upon it. Moore v. State, 7 Tex. App. 42; Valesco v. State, 9 Tex. App. 77. . . ."

In Barfield v. State, 45 S.W. 1015 (Tex.Cr.App. 1898) (a prosecution for unlawfully carrying a pistol), it was

noted that the omission of the word "did" in charging the acts committed, in an unbroken line of decisions, has been held to invalidate the complaint, information or indictment as the case may be. A reversal was ordered.

This court in Ivey v. State, 247 S.W.2d 105 (Tex.Cr. App.) (preventing another from engaging in a lawful vocation), recognized the general rule involved but held the words "in doing so" to be sufficient in the indictment.

And, as late as 1971, this court in Mesa v. State, 462 S.W.2d 600 (Tex.Cr.App. 1971), stated:

> "It is true that '[t]he word "did" is an essential word in indictments, informations and complaints, where the acts which constitute the offense are being set forth.' 1 Branch's Ann. P.C., 2d ed., Sec. 512, p. 495 and cases there cited. Further, '[i]f the word omitted is essential to the certainty necessary in the description of the offense it cannot be supplied by intendment, and of consequence such omission is fatal to the validity of the indictment.' Id."[1]

See also 30 Tex.Jur.2d *Indictment and Information* §22, p. 571-572 and 4 Wharton's Criminal Law and Procedure §1761, p. 555 (1957).

In the instant case, the appellant, prior to trial, made a written motion to quash the indictment on the very ground now urged on appeal citing cases in support of the general rule discussed. The motion was overruled.

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[1] In *Mesa*, supra, an aggravated assault case, the court held that the failure to use the word "did" for a third time in the pleading was not reversible error under the circumstances.

It is difficult to imagine that, when the indictment was so challenged, the prosecutor did not seek a new one eliminating the question from the case. See Barfield v. State, supra; Mesa v. State, supra. He did not, and now the majority, in order to affirm the conviction, abolishes the general rule which has prevailed for so long without establishing another. The majority does not make clear whether this holding will apply only to murder with malice cases or will have application to all cases where malice aforethought is not alleged, or whether there is one rule for murder cases and another for other cases.

I cannot agree to such action. In my opinion, the omission of the word "did" was fatal for the offense was not charged in plain and intelligible language. As this court said in Moore v. State, 473 S.W.2d 523 (Tex.Cr.App. 1971),

> "It is, of course, not sufficient to say that the accused knew with what offense he was charged, but the inquiry must be whether the charge in writing furnished that information in plain and intelligible language. . . ."

I dissent.

Onion, Presiding Judge

(Delivered April 25, 1973)

Roberts, J., joins in this dissent.